1955

Remington-Rand, Inc. v. Thurman E. O'Neil : Respondent's Petition for Rehearing and Motion to Amend and Supplement the Record, and Brief in Support Thereof

Utah Supreme Court

Skeen, Thurman, Worsley Snow & Christensen; John H. Snow; Attorneys for Respondent;

Case No. 8379

IN THE SUPREME COURT
of the
STATE OF UTAH

REMINGTON RAND, INC., a corporation,

Respondent and Plaintiff,

—vs.—

THURMAN E. O'NEIL and LOIS S. MACHADO, fdba A-1 TYPEWRITER COMPANY,

Defendants.

—vs.—

DALE E. GRANT and UTAH CASH REGISTER EXCHANGE, INC., a corporation,

Appellants and Garnishee Defendants.

RESPONDENT'S PETITION FOR REHEARING AND MOTION TO AMEND AND SUPPLEMENT THE RECORD, AND BRIEF IN SUPPORT THEREOF

SKEEN, WORSLEY, SNOW
& CHRISTENSEN
JOHN H. SNOW
Attorneys for Respondent.

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RESPONDENT'S PETITION FOR REHEARING

Respondent, Remington Rand, Inc., a corporation, petitions the Court for a rehearing in this case upon the grounds hereinafter set forth.

RESPONDENT'S MOTION TO AMEND AND SUPPLEMENT THE RECORD

Respondent, under Rules 4 (h) and 5 (a), U. R. C. P., moves the Court for leave to amend the record and, under Rule 75 (h), U. R. C. P., to supplement the record as hereinafter set forth:

1. To amend the record by inserting a Certificate of Mailing on its Reply to Answers of Garnishees (R 34), which Certificate was omitted by inadvertence and mistake. The Certificate reads as follows:

> "Served the foregoing Reply to Answers of Garnishees by mailing a copy thereof to Dale E. Grant and Utah Cash Register Exchange, Inc., 153 East Second South, Salt Lake City, Utah and to Thurman E. O'Neil, 122½ South Main Street, Salt Lake City, Utah, this 5th day of April, 1955.
>
> SKEEN, THURMAN, WORSLEY & SNOW
> By /s/ Allen M. Swan"

2. To supplement the record by designation to the Clerk of the lower court to certify to the Supreme Court the transcript of proceedings in the trial court on May 2, 1955, when appellants moved the trial court to vacate and set aside its judgment. The existence of stenographic notes of the entire proceedings was not known by respondent at the time of the designation of the original record and said transcript is necessary and material to the proper decision of the Court in that it reveals that

appellants had actual notice of respondent's Reply to Answers of Garnishees prior to trial.

In support of said Petition and Motion, respondent relies upon the following points:

POINT I

THE DECISION OF THE COURT DID NOT GIVE PROPER WEIGHT TO THE FACTS AND PERMISSIBLE INFERENCES TO BE DRAWN FROM THE RECORD, SINCE SUCH RECORD, TOGETHER WITH ADMISSIONS IN APPELLANTS' BRIEF, CLEARLY REVEAL THAT APPELLANTS HAD BOTH ACTUAL NOTICE, AND IMPUTED NOTICE, OF THE ISSUES TO BE TRIED IN THE TRIAL COURT.

POINT II

RESPONDENT DID NOT OFFER PROOF OF SERVICE OF ITS REPLY TO ANSWERS OF GARNISHEES ON TRIAL, SINCE IT MISTAKENLY BELIEVED SUCH PROOF WAS IN THE RECORD AND SINCE APPELLANTS RAISED NO OBJECTION TO TRIAL UPON THE MERITS, AND, UNDER SUCH CIRCUMSTANCES, THE COURT HAS POWER TO PERMIT AMENDMENT OF PROOF OF SERVICE UNDER THE PROVISIONS OF RULE 4 (h) AND RULE 5 (a), U. R. C. P., TO SHOW THE TRUE FACTS.

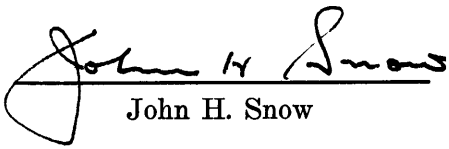
POINT III

THE COURT'S DECISION FOLLOWED FROM ITS FINDING THAT APPELLANTS HAD NO KNOWLEDGE OF THE REPLY TO ANSWERS OF GARNISHEES AND SINCE THE REQUESTED SUPPLEMENTAL RECORD REVEALS AP-

PELLANTS, IN TRUTH, HAD SUCH KNOWLEDGE, THE MOTION TO SUPPLEMENT THE RECORD SHOULD BE GRANTED UNDER RULE 75 (h), U. R. C. P., SO THAT ALL FACTS ARE BEFORE THE COURT.

WHEREFORE, respondent prays that its petition for rehearing and its motion to amend and supplement the record be granted and that upon such rehearing, and after consideration of the complete factual record, and all inferences therein, the decision of the Court be recalled, and the judgement of the lower court affirmed.

SKEEN, WORSLEY, SNOW
& CHRISTENSEN



John H. Snow

Attorneys for Respondent

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND MOTION TO AMEND AND SUPPLEMENT THE RECORD

By its reversal of the judgment on appeal, this Court upheld appellants' claim that they had no notice of a document entitled Reply to Answers of Garnishees prior to the trial in the lower court, and that appellants thereby had no notice of the issues which were to be tried.

Respondent does not dispute the principle of law announced by the Court, but we earnestly contend that the principle has no proper application in this case, in view of the facts and inferences in the record already certified to this Court. It is believed the Court did not fully realize the significance of many facts and that on the former hearing and in the Brief, we did not effectively direct the Court's attention to the inescapable factual inferences to be found in this record.

In order to remedy this situation, and to prevent a manifest injustice, the following argument is respectfully submitted.

STATEMENT OF POINTS

I. THE DECISION OF THE COURT DID NOT GIVE PROPER WEIGHT TO THE FACTS AND PERMISSIBLE INFERENCES TO BE DRAWN FROM THE RECORD, SINCE SUCH RECORD, TOGETHER WITH ADMISSIONS IN APPELLANTS' BRIEF, CLEARLY REVEAL THAT APPELLANTS HAD BOTH ACTUAL NOTICE, AND IMPUTED NOTICE, OF THE ISSUES TO BE TRIED IN THE TRIAL COURT.

II. RESPONDENT DID NOT OFFER PROOF OF SERVICE OF ITS REPLY TO ANSWERS OF GARNISHEES ON TRIAL, SINCE IT MISTAKENLY BELIEVED SUCH PROOF WAS IN THE RECORD AND SINCE APPELLANTS RAISED NO OBJECTION TO TRIAL UPON THE MERITS, AND, UNDER SUCH CIRCUMSTANCES, THE COURT HAS POWER TO PERMIT AMENDMENT OF PROOF OF SERVICE UN-

DER THE PROVISIONS OF RULE 4 (h) AND RULE 5 (a), U. R. C. P., TO SHOW THE TRUE FACTS.

III. THE COURT'S DECISION FOLLOWED FROM ITS FINDING THAT APPELLANTS HAD NO KNOWLEDGE OF THE REPLY TO ANSWERS OF GARNISHEES AND SINCE THE REQUESTED SUPPLEMENTAL RECORD REVEALS APPELLANTS, IN TRUTH, HAD SUCH KNOWLEDGE, THE MOTION TO SUPPLEMENT THE RECORD SHOULD BE GRANTED UNDER RULE 75 (h), U. R. C. P., SO THAT ALL FACTS ARE BEFORE THE COURT.

ARGUMENT

POINT I.

THE DECISION OF THE COURT DID NOT GIVE PROPER WEIGHT TO THE FACTS AND PERMISSIBLE INFERENCES TO BE DRAWN FROM THE RECORD, SINCE SUCH RECORD, TOGETHER WITH ADMISSIONS IN APPELLANTS' BRIEF, CLEARLY REVEAL THAT APPELLANTS HAD BOTH ACTUAL NOTICE, AND IMPUTED NOTICE, OF THE ISSUES TO BE TRIED IN THE TRIAL COURT.

The decision of the Court states in part:

> "Although a reply to answer of garnishee was filed, and it was admitted that it was actually served on . . . O'Neil, there was no proof . . . that such service was made on the garnishees herein, nor was there any evidence that they had any knowledge of it, or its contents before the hearing."

It is respectfully submitted that the Court did not consider the cumulative effect of the many factors in the

record which, when considered together, clearly reveal that appellants had both actual and imputed notice of our Reply.

A summary of these factors includes the following:

(a) The notice of the garnishment hearing informed both appellants that the purpose of the hearing was "to determine the indebtedness, if any, due Thurman E. O'Neil by . . ." the appellants.

Obviously, Grant, acting for himself and the corporate appellant, took this notice to appellants' attorney. It is equally obvious that counsel knew what answers were filed by the garnishees, since the answers were prepared on his typewriter and were sworn before him as Notary Public long before a Reply was filed (R 15). The answers revealed no indebtedness. When counsel received the notice of hearing, he, as a lawyer, was at once on notice that he would be required to meet the issue of a claimed indebtedness. Under present rules, many complaints in civil actions contain no more than an allegation of indebtedness and if the defendant desires to know more than that, discovery procedures are open to him.

(b) While it is true that Grant was subpoenaed as a witness by plaintiff, the record reveals he was never called by plaintiff. After plaintiff rested, Grant, without any objection, took the stand as a party ordinarily does, to refute respondent's case.

Further, the subpoena served on Grant required him to bring to court books, records and checks reflecting the payments made by him or the Utah Cash Register Exchange to O'Neil. A cursory examination of this subpoena by counsel obviously showed him that a hearing encompassing the past transactions between O'Neil and appellants would be conducted.

(c) Appellants received notice of the hearing 13 days in advance and were served with subpoena two days before the hearing, yet they would have the Court believe they or their counsel made no effort to examine the file in the District Court despite the matters described in paragraphs (a) and (b).

(d) In addition to the above factors, appellants say, on page 5 of their brief, that they knew of the existence of the Reply filed by respondent although "its *exact* contents were not known to them prior to the hearing." (Emphasis supplied).

Appellants are "hedging". Their statement is evasive and equivocal. By claiming not to know the "exact" contents of the Reply, they cannot escape the doctrine of imputed notice. As stated in 66 Corpus Juris Secundum, Notice, Section 11, " . . . a person who has notice of facts which would cause a reasonably prudent person to inquire as to further facts is chargeable with notice of the further facts discoverable by proper inquiry . . ."

Courts have applied this doctrine to do equity and

to prevent injustice. It is ordinarily found in cases where it would be "unconscionable . . . to permit . . . " a party to assert he had no notice. 66 C.J.S., Notice, Section 11 b.

In the present case, appellants never gave the slightest indication they were unaware of the contents of the Reply until after the Sheriff had levied upon them pursuant to the garnishee judgment. It would be unconscionable to permit them now to assert successfully that they didn't know the "exact" contents of the Reply and thereby, to avoid the judgment and levy.

(e) Although Grant claims he appeared on trial only as a witness, it is significant that he appeared with counsel and sat at the opposite side of counsel table with his counsel just as any party sits with his lawyer in the trial of a contested matter. Direct and cross examination of the witnesses was conducted in the same fashion as in any trial. The record of trial is totally barren of any claim of surprise or objection to the proceedings. No continuance was asked. No objection was made that the evidence sought to be elicited was immaterial or irrelevant, or otherwise beyond the scope of issues counsel obviously intended to meet.

Finally, although appellants now vigorously assert to this Court, through their counsel, that they didn't know they were to participate in a trial, that Grant appeared only as a witness, and that it was only later that they realized a trial had occurred, the record reveals

Mr. Fuller stated: "*We rest,* Your Honor." (emphasis supplied) (R 93).

(f) A close examination of the questions asked by appellants' counsel on cross examination of respondent's witnesses and direct examination of his own witnesses clearly reveals an intimate knowledge of the business affairs of all the parties to this suit and of matters and issues being tried by the court and a genuine attempt to meet these issues.

(g) Appellants' contention before this Court that they were "dumbfounded" and unaware of what was happening in the lower court is ridiculous in the face of the following colloquy between court and counsel at the beginning of the hearing (R 40):

> "MR. SWAN: Your Honor, Mr. O'Neil is not in court today. The party against whom we are asking a garnishee judgment is here, Mr. Grant, Dale Grant, whose attorney is representing also today Utah Cash Register Exchange, a corporation.
>
> "THE COURT: Well, you are not taking anything personally against Mr. Grant.
>
> "MR SWAN: Yes, Your Honor, we are. We have prayed for judgment in the alternative, either Mr. Grant or the corporation.
>
> "THE COURT: He hasn't been garnished, has he?

"MR. SWAN: Yes. I think your file will show two garnishments, Your Honor, one against the corporate defendant and one against Grant personally.

"THE COURT: Oh, yes, I see; and what does he answer personally? That he owed nothing?

"Mr. SWAN: They both answered that they were not in debt.

"MR. FULLER: However, they answered they had some goods belonging to O'Neil in their possession, and we disclaimed interest in those.

"THE COURT: Dale E. Grant has answered, 'No, except as stated in answers to garnishment served on the Utah Cash Register Exchange, and in that Dale E. Grant doesn't claim to be indebted.

"MR. FULLER: Dale Grant is president of the Utah Cash Register Exchange.

"THE COURT: Yes, and if they can show that he holds any property, I suppose judgment would be taken against him here, and you propose to do that as against the individual?

"MR. SWAN: If it is the judge's decision that he does owe property rather than cash or rather than indebtedness, yes.

"THE COURT: You may proceed to try to show what that is then."

It will be noted that Mr. Swan commented that Mr. Fuller, attorney for the appellants, was in court and was

representing not only Mr. Grant, but the Utah Cash Register Exchange. Mr. Fuller made no objection to this statement but would now have us believe he appeared only as counsel for Grant, as a witness. The quoted colloquy, together with the record of appearances of counsel (R 39), conclusively disproves counsel's present contention.

Then, it should be noted that Mr. Swan stated he was asking judgment in the alternative against either Mr. Grant or the corporation. After further colloquy between court and counsel concerning the proposed plan of attack to be followed by plaintiff, the court stated, ". . . I suppose judgment would be taken against him (Grant) here . . . " (R 41).

(h) The record, at page 55, and page 64, reveals appellants' counsel knew enough about the issues being tried to question witnesses concerning another pending case involving defendant O'Neil, in an effort to refute respondent's theories. It is difficult to see how counsel could have been better prepared than in this case.

(i) There is no showing made that appellants' position or proof would have been different on any other hearing of these issues. We submit that unless prejudice is shown, appellants have not sustained the burden imposed upon them to overcome the presumptively correct decision of the lower court.

In summary, respondent contends that appellants'

outraged cry of "lack of notice" is mere afterthought, to escape the levy which followed judgment. We submit that parties to litigation too often submit to trial court action without objection, with no request for continuance, with no claim of surprise or prejudice, and when the decision is adverse, produce a carefully concealed "ace in the hole" to win a lost cause. Courts ought not to countenance such conduct.

If, as appears clear from the record, appellants had actual notice, they should fail in their contention now. If they knew only that a Reply was in existence, but did not learn its "exact" contents, they still should fail, for where " . . . facts put a person on inquiry, notice will be imputed to him if he designedly abstains from inquiry for the purpose of avoiding notice . . . " 66 C. J. S., Notice, Section 11.

POINT II.

RESPONDENT DID NOT OFFER PROOF OF SERVICE OF ITS REPLY TO ANSWERS OF GARNISHEES ON TRIAL, SINCE IT MISTAKENLY BELIEVED SUCH PROOF WAS IN THE RECORD AND SINCE APPELLANTS RAISED NO OBJECTION TO TRIAL UPON THE MERITS, AND, UNDER SUCH CIRCUMSTANCES, THE COURT HAS POWER TO PERMIT AMENDMENT OF PROOF OF SERVICE UNDER THE PROVISIONS OF RULE 4 (h) AND RULE 5 (a), U. R. C. P., TO SHOW THE TRUE FACTS.

The record reveals that when the trial court reached this matter on its calendar, the parties proceeded to in-

quire into all phases of the matter without objection. Respondent made no attempt to prove that it had served the Reply to Answer of Garnishees on the appellants because counsel for respondent believed that a Certificate of Mailing to these parties was a part of the Reply and was in the record. His belief in this regard was strengthened by the fact that no objection was made and no request was made for a continuance.

As all lawyers know, there are many times when, in response to a complaint, an adverse party appears in court and, if no question is raised concerning the service of a summons or the entry of an appearance, the party is deemed to be "before the court" and no proof of service is offered, even if available, and such a defendant will not be heard later to say that he had no notice of the nature of the proceedings.

Since appellants now strenuously complain that they had no notice and since counsel for respondent distinctly recalls having prepared copies of the Reply for them and recalls having had prepared envelopes in which such copies were to be mailed, we now seek to amend the record by inserting a Certificate of Mailing as indicated in the Motion hereinbefore set forth.

This proposed Certificate of Mailing is in accord with the statements made to the Supreme Court by counsel upon oral argument, which statement would not have been made to the Court in response to Mr. Justice Wade's question if in fact no service by mail had been accom-

plished. As the Court is no doubt aware, counsel for respondent are not in the habit of making untrue statements to the Supreme Court or to any court.

We view the Certificate of Mailing and the Reply to Answers of Garnishees as a form of process, in view of the provisions of Rule 5 (a), U.R.C.P., which states, in part:

> " . . . that pleadings asserting new or additional claims for relief . . . shall be served . . . in the manner provided for service of summons in Rule 4."

Rule 4 (h), U.R.C.P., provides:

> "At any time in its discretion and upon such terms as it deems just, the Court may allow any process or proof of service thereof to be amended . . . "

While decisions construing Rule 4 (h) are not numerous, our research indicates that the rule receives a liberal interpretation in order that the record will conform to fact. *Wieland & Son* v. *Wickard,* 68 Fed. Supp. 93, 4 Fed. Rule Dec. 250 (E. D. Wisc., 1945) involved a matter wherein service of process was required to be made upon the Secretary of Agriculture by delivering to him a copy of the complaint. Plaintiff's complaint was filed with the clerk with the request that no summons be issued, but that the defendant be served by mailing from the office of the United States Marshal. No summons was issued and no proof of mailing was in the file. The Court said:

> "In my opinion the court is authorized under Rule 4h to allow the necessary procedural amendments in order that the merits of the plaintiff's claim may be adjudicated. * * *
>
> "It will be noted that under the rule the power to allow amendments is not limited in point of time and that it exists with reference 'to any process' which manifestly includes such as is legally defective. The power to amend, however, is limited. As observed in *Gagnon* v. *U. S.*, 193 U. S. 451, 456, 24 S. Ct. 510, 511, 48 L. Ed. 745, the power to amend must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending the record is analgous to that between the construction and repair of a piece of personal property."

It is true that the *Wieland* case treats the proof of mailing of a complaint as "proof of service of process." In the instant case, "proof of service of process," quite accurately describes the proposed amendment which respondent by its motion to amend seeks at this time. The absence of the Certificate of Mailing on the Reply constitutes "an omission of some entry which should have been made during the progress of the case," or perhaps even more accurately, "some clerical error or mistake."

A similar result was reached in the case of *Burdick* v. *Powell Brothers*, 91 Fed. Supp. 12 124 Fed. 2d 694,

1 Fed. Rule Dec. 220 (N.D., Ill., 1940). The question was not discussed by the Circuit Court of Appeals, but the United States District Court for Illinois permitted an amendment to cure a defect in the affidavit of service of summons.

In the case of *English* v. *Smith,* 259 P. 2d 857 (1953), the Supreme Court of Wyoming allowed an amendment to the record after the dismissal of an appeal, to correct an erroneous date entered by the Clerk of the District Court. In its decision the Court said:

> "Generally a record cannot be amended after dismissal of an appeal, but there are exceptions to the general rule. * * *
>
> "It appears to be a matter of discretion here for this Court, in McGinnis v Beatty (citing case) commented, 'though we hold that the Court has jurisdiction after an order dismissing an appeal for a defect in the record, to grant a motion to permit an amendment of the record filed in connection with a motion to reinstate on a petition for a rehearing it should not be understood that such a motion then filed for the first time will be granted in all cases or as a matter of right, but whether it will or ought to be granted must depend upon the facts and circumstances of the particular case as affecting the right to amend, in view of the delay in the application, in addition to the showing ordinarily necessary to justify the return of a record for amendment.' "

So far as we can determine by use of Shepard's Citator, these cases have not been overruled or success-

fully attacked, and respondent asserts that the principle of the cases is correct, particularly in view of the language of Rule 4 (h), which permits the court to allow such amendments "at any time in its discretion." Such wording clearly does not limit an amendment to a time prior to the decision of the Supreme Court, and where, as here, the record ought to be amended so that the true and complete facts are before the Supreme Court, we submit that the Court, in the exercise of its discretion, should grant the motion to allow insertion of the Certificate of Mailing on respondent's Reply to Answers of Garnishees.

POINT III.

THE COURT'S DECISION FOLLOWED FROM ITS FINDING THAT APPELLANTS HAD NO KNOWLEDGE OF THE REPLY TO ANSWERS OF GARNISHEES AND SINCE THE REQUESTED SUPPLEMENTAL RECORD REVEALS APPELLANTS, IN TRUTH, HAD SUCH KNOWLEDGE, THE MOTION TO SUPPLEMENT THE RECORD SHOULD BE GRANTED UNDER RULE 75 (h), U. R. C. P., SO THAT ALL FACTS ARE BEFORE THE COURT.

The supplemental record which respondent desires the Court to consider consists of a seven-page transcript of proceedings reflecting what transpired on May 2, 1955 when appellants' motion to vacate and set aside the garnishee judgment came on for hearing.

Respondent informs this Court that at the time the original record was designated on appeal, it was unaware that the court reporter in the trial court had taken steno-

graphic notes of the colloquy between court and counsel when appellants' motion came on for hearing May 2, 1955. Following the decision of this Court, inquiry was made of the court reporter, who at first advised no such notes had been taken, but who subsequently informed respondent's counsel that she had in fact taken notes of all matters except legal argument, and a transcript was accordingly prepared.

Counsel for respondent were not aware of the import of the statements by appellants' counsel until this transcript was prepared, and it was therefore impossible for it to have been made a part of the original record.

The more significant portions of this transcript include an exchange between court and counsel wherein it clearly appears that counsel for appellants had knowledge of the Reply to Answers of Garnishees before the trial in the lower court. This exchange is as follows:

> "MR. FULLER: Well, Your Honor, in this matter our position is simply that there was no reply ever served pursuant to the rules on the defendant.
>
> "THE COURT: It may have been, and he would have been entitled to it. He could have had it at that time, but he didn't call my attention to it and didn't seem to be none the worse for the battle.
>
> "MR. FULLER: Well, the matter of fact is we take the position that the judgment that was rendered exceeded what could have been granted

under the circumstances. *We felt that it should be limited to the matter set forth in the reply.* If you will recall and will check the record, the defendant was called to court on a subpoena. He had no attorney prior to that time.

"THE COURT: Didn't he have an attorney in here that day?

"MR. FULLER: I was here that day.

"THE COURT: Yes.

"MR. FULLER: Prior to that time. And I specifically asked the witness Snyder — *now, I had knowledge that there was a reply and answer.* It was served on O'Neil and also on his attorney. *And I specifically asked Snyder at that hearing whether they were trying to assert a fifty per cent ownership as set forth in that reply,* and he said absolutely, there was no such an understanding.

"THE COURT: I ruled against him on that, didn't I?

"MR. FULLER: Pardon?

"THE COURT: Didn't I rule against him on that?

"MR. FULLER: You didn't have to rule on that.

"THE COURT: Oh.

"MR. FULLER: *And I assumed at that time that they were not then proceeding on the basis*

> *of this so-called reply that had been filed; and when Your Honor ruled on this alter ego business, I think that far exceeded what was set forth in the notice that came out.* I think Your Honor shouldn't have ruled as you did because I don't believe we were fully apprised of that aspect of the proceedings. In any event, I think there was enough surprise that came into the matter that we didn't really know which theory they were proceeding on at the hearing." (Italics ours)

This exchange makes it clear that counsel for appellants not only knew that there was a reply prior to the hearing, but knew of its contents. Mr. Fuller mentions the partnership theory, states that he asked the witness Snyder at the hearing concerning the theory, received an answer which apparently disproved the existence of a partnership and then "assumed that the plaintiff was not proceeding on the basis of the reply that had been filed."

The rule on which respondent relies as a basis to supplement the record is Rule 75 (h), U.R.C.P., the material portions of which read as follows:

> "If anything material to either party is omitted from the record on appeal by error or accident . . . the Supreme Court on a proper suggestion, or on its own initiative, may direct that the omission . . . shall be corrected and if necessary that a supplemental record shall be certified and transmitted by the Clerk of the District Court."

This rule is substantially the same as Federal Rule 75 (h), which has been construed by the courts to allow a

record to be supplemented in order to include any portion of the proceedings in the lower court which may be material or necessary to a proper disposition of the case on appeal.

This Court has construed Rule 75 (h) in the case of *Boskovich* v. *Utah Construction Company,* 259 P. 2d 885 (1953). In that case this Court allowed a correction of the record to show a certain statement of the trial court at the time of hearing. The Court stated, at page 888: "The correction of the record was properly made even though not made until after the record had been transmitted on appeal to this court, under the authority of Rule 75 (h) which was purposely made broad enough by the Committee on Rules to cover any situation requiring remedial action to present a complete and accurate record of proceedings below."

The *Boskovich* case cites with approval *Dempsey* v. *Guaranty Trust Company of New York,* 131 F. 2d 103, wherein the Circuit Court of the 7th Circuit states:

> "It is clear that the purpose of this part of Rule 75 (75 h) was to provide a simple method of adding to the record on appeal any matter properly a part thereof which had been omitted therefrom by error or accident, and that such addition would be made even after the record had been transmitted to the court of appeals. The rule, however, was never intended to permit the addition of matter not before the District Court when he entered his order."

The Arizona Supreme Court has construed its Rule which appears to be identical to Federal Rule 75 (h) in the case of *Hughes* v. *Young,* 123 P. 2d 396, 138 A.L.R. 943, and states the following:

> "This is a provision of the new rules which was intended to obviate the necessity of a judgment being affirmed on account of the fact that a complete record of the proceedings in the lower court was not before this court, when, if such record was brought up, it would show that the judgment should be reversed. The rule is obviously in the interest of justice and to permit affirmance due to the inadvertence of counsel in completing the record in this court and should be liberally construed, but there are limits to its application. We may by virtue thereof have any records of proceedings of the lower court which has been omitted from the court on appeal, brought before us *at any time* if we think it is necessary in order to do justice on the merits of the case, but we may not supply evidence which was never presented to the lower court even though it may be that such evidence is in existence somewhere." (italics ours).

The rule has also been construed to allow the record to be corrected where, as here, the decision of the appellate court has already been rendered.

American Chemical Paint Company v. *Dow Chemical Company,* 164 F. 2d 208 (Cir. Ct. of App. 6th, 1947), is a case in which a party moved for a correction of the record at the time a petition for rehearing was filed, which motion asked for the Circuit Court to order the

District Court to certify a transcript of a proceeding had in the lower court, in which the appellant allegedly waived a particular question of law by the admission of its counsel. In that case the proceedings deemed material were not a part of the original transcript of the record when the appeal was considered due to the fact that the parties stipulated in preparing the record on appeal that it be omitted. The appellate court entered an order subsequent to its decision and opinion that the oral argument in the court below appeared material to the disposition of the appeal, and that pursuant to the provisions of Rule 75 (h), Rules of Civil Procedure, a supplemental record containing a transcript of the argument be certified and transmitted by the Clerk of the District Court to the Clerk of the Circuit Court. The appellant contended that the supplemental record was not properly before the Circuit Court, the argument being that Rule 75 (h) permitted the appellate court to order a supplemental record if anything material to either party "is omitted from the record on appeal by error or accident, or is misstated therein," and that none of those conditions existed in that the omission of the transcript of argument was deliberate and by agreement. The Circuit Court stated:

> "We believe that the rule is broad enough to cover a case of this kind, and that when the parties, acting in good faith in an attempt to eliminate portions of the record erroneously believed at the time to be irrevelant, have omitted a portion of the record considered by the appellate court to

> be material to a proper disposition of the appeal, the court may direct that the omitted portion be supplied in order to make a proper disposition of the question presented."

In the light of these authorities, there can be no doubt that the Court has the power, and, indeed the duty, to require the supplemental record to be brought before it.

If this be done, there will remain no doubt that the parties knew what the issues were, that the matter was fully tried without objection or claim of surprise, and the issues were investigated and tried by the trial judge as thoroughly as could have been done under any circumstances.

In support of the lower court, it should be noted that, contrary to the assertion in appellants' brief (page 10), the court did not rule peremptorily, but heard argument after a recess, before the decision was announced. In this argument, appellants at no time raised the objections which are now so thoroughly asserted.

As Mr. Justice Cardozo stated, in *Doty* v. *Love,* 295 U. S. 64, 79 L. Ed. 1303 (1934):

> "Finally the appellants say that the proceedings in the court of chancery are void, for insufficient notice to the depositors and others. A sufficient answer is that the appellants appeared generally and were fully heard upon the merits."

It is respondent's position that the appearance by appellants at the hearing and their complete and whole-hearted participation therein without objection before, during or after the evidence was heard, constituted a waiver of any defect which may have occurred in procedures prior to that time.

We have mentioned waiver at this point in the argument because it is our earnest belief that the proposed supplemental record amply emphasizes that appellants did not make objection because they did not find anything objectionable until they experienced the weight of judgment and a levy of goods thereunder.

Since the supplemental transcript clearly shows that counsel for appellants not only knew of the existence of the Reply, but was aware of the theories contained in it, the Court ought to grant the motion to supplement the record so that its decision will not be based upon half truths, but will clearly reflect all matters on which the trial court's judgment depended.

CONCLUSION

The Court's decision in this case quotes an excerpt from *National Farmers Union Property & Casualty Co.*, v. *Thompson*, ... Utah ....., 286 P. 2d 249, which states, in part, ". . . if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it."

That comment referred to Rule 15 (b), U.R.C.P., and the Court noted that, contrary to the rule, there was no "express or implied assent" to try the issue of value.

This is not such a case. The quoted principle is good law, but is not the controlling principle here, where both the original record, and the proposed supplement, show clearly an implied consent to try the issues involved.

The principle applicable in the present case is to be found in the portion of Rule 54 (c) (1), quoted also by this Court in *Morris* v. *Russell,* 236 P. 2d 451: ". . . every final judgment shall grant the relief to which the party . . . is entitled, even if the party has not demanded such relief in his pleadings . . . "

The trial judge here obviously granted the relief he thought the evidence required. He was faced with no objections of any kind regarding notice. This Court's insistence that he nevertheless committed reversible error would result in most substantial injustice, and the decision of the Court should therefore be recalled and the entire matter reheard.

Respectfully submitted,

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